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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY and FRANK DEMPSEY, for and on Behalf of Themselves and All Other Patrolmen, Sergeants and Turnkeys of the Metropolitan Police Force of the City of St. Louis, Similarly Situated, Appellants,

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN and ALOYS P. KAUFMANN, Constituting the Board of Police Commissioners of the City of St. Louis, Appellees.

No. 630

Appeal from the Supreme Court of the State of Missouri.

APPELLANTS' BRIEF IN OPPOSITION TO DISMISSAL OF APPEAL.

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OPINIONS BELOW.

The opinions of the Supreme Court of the State of Missouri in this cause are reported in 206 S. W. (2d) 547.

ARGUMENT.

Since appellees in their statement of suggestions making against the jurisdiction of this court are in effect asking for a dismissal of the appeal heretofore allowed herein, appellants are filing this brief in opposition to such dismissal. Inasmuch as in our statement as to the jurisdiction of this court, particularly sections (e) and (f) thereof, we have fully stated why we believe this court has jurisdiction, we shall not repeat the arguments there set forth, but shall endeavor to confine ourselves to replying to the contentions of appellees in their statement.

(a)

Rule 23, Section 342 of the Police Manual, Is a "Statute of a State" Within the Meaning of Sec. 237 (a) of the Judicial Code.

Appellees in their statement contend that since Rule 23, Section 342 of the Police Manual, prohibiting members of the Metropolitan Police Force from belonging to a union, applies only to members of the force, and is not of general application, it is not a "statute of a state" within the meaning of Sec. 237 (a) of the Judicial Code. However, we find nothing in the decisions of this court which would thus restrict its jurisdiction. One of the leading cases defining the term "statute of a state" is John P. King Mfg. Company v. City Council of Augusta, 277 U. S. 100, 72 L. Ed. 801, 48 S. Ct. 197, where this court said:

> "Any enactment from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited relating to the jurisdiction of this court."

Appellees admit that municipal ordinances have been considered "statutes of a state" by this court, since they

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are enacted by the municipal legislative bodies under authority of power delegated to them by state legislatures. A rule adopted by the Board of Police Commissioners of the City of St. Louis under authority delegated to it by Sec. 7695, R. S. Mo. 1939, was likened to an ordinance of a municipality by the Supreme Court of Missouri in the case of State ex rel. Kennedy v. Remmers, 340 Mo. 126, 101 S. W. (2d) 70, 72. Consequently, a decision of the Supreme Court of Missouri sustaining the validity of such a rule should be reviewable by this court as in the case of an ordinance of a municipality.

The challenged rule was adopted under authority of the State of Missouri, and has the force of law just as if a statute to the same effect had been adopted by the legislature of Missouri, for the rule must "be obeyed by the police force on pain of dismissal or such lighter punishment * * * as the board may adjudge." Sec. 7695, R. S. Mo. 1939. If a statute had been adopted by the Missouri legislature embodying the substance of the rule, certainly this court would have jurisdiction to review a decision of the Supreme Court of Missouri upholding it, and we are unable to perceive how the fact that the rule was adopted by appellees' predecessors in office, pursuant to authority delegated to them by the legislature, can deprive this court of such jurisdiction.

If, however, this court feels that an appeal does not lie in this case, we respectfully pray that the papers on which the appeal was allowed be regarded and acted on as a petition for certiorari, and that certiorari be granted. Sec. 237 (c) of the Judicial Code, as amended. 28 U. S. C. A. 344 (c). C. J. Hendry Co. v. Sematovich, 316 U. S. 643, 86 L. Ed. 1728, 62 S. Ct. 1031.

(b)

The Appeal Does Involve a Substantial Federal Question as to the Validity of Rule 23, Section 342 of the Police Manual.

Appellees contend that since a number of state courts have upheld rules similar to Rule 23, Section 342 of the Police Manual, and the decision of the Supreme Court of Missouri was unanimous in sustaining the rule, this appeal does not raise any substantial federal question. Appellees also cite decisions of this court in which restrictions on the right of civil service employees engaging in political activities have been sustained. The question as to whether a state or a municipality may prohibit its officers or employees from belonging to a labor union without violating their rights under the Constitution of the United States, however, has never been decided by the Supreme Court of the United States, and we respectfully submit that it should be in view of the numerous cases arising and which are likely to arise in which the right to join unions is or will be asserted by such officers or employees under their rights of freedom of speech, assembly and petition guaranteed to all persons by the First and Fourteenth Amendments to the Constitution of the United States. After all, the final determination of the rights of such state and municipal employees under the federal constitution is a matter for this court, and the sooner this court authoritatively determines the same, the better for all persons concerned.

The Missouri Supreme Court, en Banc, in the case of City of Springfield v. Clouse, 206 S. W. (2d) 539, decided concurrently with the case at bar, while holding that public officers and employees do not have the right of collective bargaining with their employers, nevertheless does recognize that public officers and employees generally do have

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the same rights as other citizens to organize and bring their problems to the attention of public officers and legislative bodies. We quote from the decision of the court (l. c. 542):

> "This ruling does not mean, as defendants' counsel seem to fear, that public employees have no right to organize. All citizens have the right, preserved by the First Amendment to the United States Constitution and Sections 8 and 9 of Article 1 of the 1945 Missouri Constitution, Sections 14 and 29, Art. 2, Constitution of 1875, to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body. Employees had these rights before Section 29, Article 1, 1945 Constitution, was adopted. See Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 237 Wis. 164, 295 N. W. 791, affirmed 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154; Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, 60 S. Ct. 561, 84 L. Ed. 738. Organization by citizens is a method of the democratic way of life and most helpful to the proper functioning of our representative form of government. It should be safeguarded and encouraged as a means for citizens to discuss their problems together and to bring them to the attention of public officers and legislative bodies. Organizations are likewise helpful to bring public officers and employees together to survey their work and suggest improvements in the public service as well as in their own working conditions. Our General Assembly has even provided by statute for an organization of all trial and appellate judges of this state to consider and discuss the work of the courts and make recommendations for legislation. See Judicial Conference Act of 1943, Laws 1943,

p. 514, Mo. R. S. A. 2039.1-2039-8. Organizations of other state, county and municipal officers are well known and have long been recognized as serving a useful purpose. Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. See United Public Workers v. Mitchell, 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. ...; Oklahoma v. United States Civil Service Commission, 330 U. S. 127, 67 S. Ct. 544, 91 L. Ed. ...; King v. Priest, Mo. Sup., 206 S. W. 2d 547, and cases therein cited. This is because a public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare or be required for the discipline of a military or police organization.

"Therefore, we start with the proposition that there is nothing improper in the organization of municipal employees into labor unions; and that no new constitutional provisions were necessary to authorize them."

The Missouri Supreme Court, however, in the case at bar, has denied appellants the right to organize, which it says is the right of public officers and employees generally, on the grounds that such denial in the case of policemen is necessary for the public welfare. We have referred in section (f) of our statement as to the jurisdiction of this court to the decisions of this court which hold that **the rights of freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. The opinion of the Missouri Supreme Court in the case at bar fails to point out what grave and immediate danger to interests which the state may lawfully**

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protect arises from membership of appellants in a union such as the one involved in this case. The record discloses that Local No. 549 does not have the right to strike, and Article III of its Constitution, which can never be amended, provides that the duties of members of the union as members of the Police Force shall come first and be superior to any obligation to the local, the American Federation of State, County or Municipal Employees or to any other organization, and that all members are obliged at all times to perform their duties as members of the police force diligently and faithfully and without partiality or prejudice. It is apparent, therefore, that this union does not possess the characteristics of an ordinary labor union, but is actually no more than an organization of members of the police force brought into existence so that its members might exercise their rights guaranteed to them by both state and federal constitutions "to peaceably assemble * * * to speak freely and to present their views and desires to any public officer or legislative body" which might have the power to remedy such grievances they might have or believe they have. As the Missouri Supreme Court said in the City of Springfield case, supra, this right of citizens to organize "should be safeguarded and encouraged as a means for citizens to discuss their problems together and to present them to the attention of public officers and legislative bodies." This is the only right which appellants in this case are claiming. Some kind of organization is necessary effectively to accomplish this purpose. No reason has been shown why such purpose could not be properly accomplished through the union which appellants have organized.

As we have stated, this court has never passed on the constitutional questions involved in this case. Appellees contend that the cases of United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 509, 67 S. Ct. 556; Ex Parte

Curtis, 106 U. S. 371, 27 L. Ed. 232, 1 S. Ct. 381, and United States v. Wurzbach, 280 U. S. 396, 74 L. Ed. 508, 50 S. Ct. 167, in which this court has upheld restrictions on political activities of federal officers and employees, are authority for lack of jurisdiction of this appeal. We submit, however, that these cases do not decide the questions involved in the case at bar so that this court should decline to take jurisdiction for lack of a substantial federal question.

Appellants have cited a number of cases in which various appellate courts have upheld restrictions on the right of police, firemen and other public employees to become members of labor unions. Many of these cases, however, do not consider or pass on the constitutional questions raised by appellants in this case. Thus, in Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N. W. (2d) 310, no federal questions were raised so far as appears from the opinion of the court. This was sufficient reason for this court to deny certiorari. 321 U. S. 68, 88 L. Ed. 1076, 64 S. Ct. 781. Furthermore, the resolution of the Board of Police Commissioners complained of in the Michigan case did not prohibit patrolmen from joining the plaintiff organization, but only prohibited the taking in of associate members who were not police, but members of the general public, and required that membership in the union be limited to members of the police department below the rank of sergeant.

Likewise in City of Jackson v. McLeod, 199 Miss. 676, 24 So. (2d) 319, certiorari denied 322 U. S. 863, 90 L. Ed. 1633, 66 S. Ct. 1368, the majority opinion of the court did not discuss the constitutional questions raised in the case at bar, and it appears that this court was justified in denying certiorari, since no federal questions were passed upon. Furthermore, there was a strong dissenting opinion filed in this case by McGehee, J. The Jackson case is not

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in point on the facts either, as the court there laid great stress on the pledge taken by members of the union involved, whereby they pledged themselves "at all times to bear true and faithful allegiance to the American Federation of State, County and Municipal Employees and to the labor movement in general." This pledge does not exist in the case at bar. Members of Local 549, on the other hand, are bound by Article III of the Constitution of the local to place their duties as members of the police force first, and their obligation as such members of the force is superior to any obligation to the union or any other organization.

The cases of Perez v. Board of Police Commissioners, City of Los Angeles, 178 Pac. (2d) 537, and Congress of Industrial Organizations v. City of Dallas, 198 S. W. (2d) 143, decided respectively by the District Court of Appeals, Second District, Division 1, of California, and by the Court of Civil Appeals of Texas, being decisions of intermediate appellate courts of those states, are certainly not such authorities as should foreclose this court from inquiring into the federal questions raised herein by appellants. Furthermore, the Dallas case is directly in conflict with the decision of the Missouri Supreme Court in the case of City of Springfield v. Clouse, supra, as the Court of Civil Appeals of Texas in the Dallas case upheld an ordinance which prohibited all officers and employees of the City of Dallas from belonging to any labor union, whether affiliated with an outside organization or not, and thus denied all such officers and employees their fundamental right to organize which the Missouri Court said all citizens have, including public officers and employees, subject to some regulation for the public welfare.

Appellees in their statement of suggestions making against the jurisdiction of this court cite Seattle High

School, Chapter No. 200, v. Sharples, 1930, 159 Wash. 424, 293 P. 994, 72 A. L. R. 1215; Frederick v. Owens, 1915, 35 Ohio Cir. Ct. R. 538; Hutchinson v. Magee, 1923, 278 Pa. 119, 122 A. 234; Carter v. Thompson, 1935, 164 Va. 312, 180 S. E. 410; McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N. E. 517, and Brownwell v. Russell, 76 Vt. 326, 57 A. 103. We are familiar with all these cases and have read them carefully. In none of them were the same constitutional questions raised and passed on as in the case at bar. Consequently they are not such authorities as should be even persuasive on the substantiality of the federal questions raised in this appeal.

Appellants respectfully submit that Rule 23, Section 342 of the Police Manual, is "a statute of a state" within the meaning of Sec. 237 (a) of the Judicial Code so that this Court has jurisdiction to review the judgment of the Supreme Court of Missouri upholding it; that the federal questions raised are substantial, and that this Court should accordingly take jurisdiction of this appeal.

Respectfully submitted,

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